IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.4014 OF 2007

Shri.Laxman Keshav Khot & Ors. .. Petitioners.

V/s.

Shri.Kanhayalal Bhagwanshing Khot .. Respondent.

Mr.U.B.Nighot for petitioners.

Mr.T.Deshmukh for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 2nd AUGUST, 2007.

P.C.:

1. Rule. Returnable forthwith by consent. Respondent waives service.

2. The petitioners are the original plaintiffs in Special Civil Suit No.1345 of 1996 on the file of the Court of Civil Judge, Senior Division, Pune.

3. That suit has been dismissed for default on 11th March, 2004. Application for restoration preferred by the

petitioners also came to be dismissed. Aggrieved thereby, an Appeal under Order 43 Rule 1 of the Code of Civil Procedure came to be preferred, which also having been dismissed by the impugned order, the present writ petition.

4. I have heard Mr.Nighot, appearing for the petitioners at length so also Mr.Deshmukh for the original defendant respondent before me.

5. Mr.Nighot submits that the Courts below fell in apparent error in holding that the reasons which have been set out by the petitioners for their absence on the relevant date are false and not genuine. He submits that the suit was dismissed for default on 11th March, 2004. Upon the fact coming to the knowledge of the petitioners, an application was preferred on 17th August, 2004 for restoration. The Trial Court condoned the delay in filing the application for restoration on the same cause but thereafter, proceeded to reject the restoration application itself. He heavily relies upon the order dated 15th October, 2005 passed by the Trial Court condoning the delay in filing the restoration application.

6. Further Mr.Nighot relies upon the fact that the

petitioner No.3 is a lawyer and he was attending the matter. Petitioner No.1 is a senior citizen. The matter was being attended by the petitioner No.3 but he met with an accident at Junnar on 4th March, 2004. Petitioner No.3 is a lawyer practicing at Junnar. He submits that this was the stage where oral evidence of the petitioners on affidavit was recorded in chief. The cross examination was under way. A document was introduced during the course of the same which necessitated the plaint being amended. However, the amendment application was rejected by the Trial Court and a Writ Petition was filed in this Court in January, 2003 being Writ Petition No.108 of 2003. It was dismissed on 4th February, 2003. It is in this context that the matter remained unattended and this is how the dismissal order came to be passed. Mr.Nighot's submission is that all procedural laws and provisions, conferring discretion on the Courts have to be construed liberally and in favour of litigants, who lose everything if there is no adjudication on merits. In such circumstances, when there is some reason set out, which cannot be said to be altogether bogus and lacking in bonafides, then, the Trial Court as well as the lower Appellate Court should have restored the suit. More so, when the delay in filing the restoration application was condoned.

7. Mr.Deshmukh, on the other hand would urge that this is a writ petition, challenging concurrent orders on the issue of restoration of a suit dismissed in default. If the discretion is not exercised arbitrarily and capriciously then, this Court has no power to interfere merely because, in its opinion, a different view of the matter can be taken. Therefore, when discretion has been exercised in consonance with the said provisions and the explanation is found to be false, then, the impugned orders should not be interfered with and the petition deserves to be dismissed.

8. With the assistance of Mr.Nighot and Mr.Deshmukh, I have perused the writ petition and the annexures thereto including the impugned orders.

9. It is undisputed that the application for restoration was filed after a delay of four months but the Trial Court condoned the delay. The delay was condoned by taking a liberal view of the matter and accepting the same explanation / reason. If that constitutes a sufficient cause for condoning the delay in the facts of this case, then, merely because the application for restoration was contested and oral evidence was recorded, does not justify

taking a different view at the final stage. The Trial Court as well as the lower Appellate Court has faulted the petitioners for not attending the Court on 20th February, 2004, when the suit was adjourned for dismissal on 11th March, 2004. On that date, the petitioner No.3 was present in the Court and was aware of the Court's order passed by the Trial Court. If he was aware of the order, then, it was the bounden duty of the petitioner No.3 to have attended the Court on the relevant date. Therefore, their non-attendance on 11th March, 2004 and the explanation therefor was found to be false. In my view, the suit was placed for dismissal after none appeared on 20th February, 2004. It may be that the petitioners were aware of this fact. However, the Courts below did not dispute the fact that the petitioner No.3 met with an accident. Merely because the accident was on 4th March, 2004, does not mean that the petitioner No.3 was fit to attend the Court straightaway. The Courts below had while not disputing the factum of this accident, faulted the petitioners for having not taken steps after being present in Court on 20th February, 2004. This is a single lapse on the part of the parties and visiting them with an extreme penalty of dismissal of their suit was not justified. The discretion has to be exercised judiciously. If the suit is pending in the Court since

1996 and parties do not attend the Court on a single date, does not mean that they have to be visited with such an order straightaway. Discretion is to be exercised in such cases considering the fact that the Courts below are tied up on several occasions in number of cases. It is not as if the party remaining absent has a right to apply for restoration. Everything depends upon the facts and circumstances in each case. No general rule can be laid down. However, one opportunity in a suit pending since 1996, certainly deserves to be granted in the facts of this case. Therefore, in my view, it is a fit case where the Courts below fell into error in rejecting the request of the petitioners for restoration. The restoration could have been ordered by putting the petitioners on certain terms, including payment of costs. The refusal to restore the proceedings has resulted in injustice to the parties and which is what the Courts below must avoid at all costs.

10. In the result, Rule is made absolute. The impugned orders are quashed and set aside. Special Civil Suit No.1345 of 1996 is restored to the file of Trial Court. However, the petitioners to pay costs quantified at Rs.5,000/- within two weeks from today. Cost condition precedent. If costs are tendered and proof thereof

produced before the Trial Court, the Trial Court to take steps to restore the suit and place it on Board. The petitioners before me undertake to remain present on the dates fixed by the Trial Court and co-operate in expeditious disposal of the suit. If on the date of first appearance of the parties, the petitioners are absent, then, it would be open for the Trial Court to proceed and dismiss the suit. On these conditions, the said suit is restored to the file. Further, the suit being of 1996, parties to co-operate and assist the Trial Court in disposing of the same as expeditiously as possible and within a period of six months from the date of the first appearance of the parties.

11. Costs to be paid to the respondent defendant in the Trial Court. All concerned to act upon an authenticated copy of this order.

(S.C.Dharmadhikari, J.)